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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1120

ANTHONY MAGGIO, CARL IPPOLITO, GUGHELIMO CICCONE, AND BARTHOLOMEW DI NOLA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 720–728, 745–747) is reported in 126 F. (2d) 155.

JURISDICTION

The judgment of the circuit court of appeals was entered January 30, 1942 (R. 729). On March 4, 1942, the circuit court of appeals denied a petition for rehearing (R. 747). The petition for a writ of certiorari was filed April 7, 1942.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the denial of petitioner Ippolito's motion for a directed verdict at the close of the Government's case compelled him to testify in his own behalf in violation of the Fifth Amendment.

2. Whether the unsolicited and unresponsive answer of a Government witness which improperly implicated one of the petitioners in a collateral crime of robbery warrants reversal of the judgments of conviction.

3. Whether the trial court improperly permitted the prosecutor to cross-examine a Government witness, whose testimony surprised him, upon the basis of prior contradictory statements.

4. After the circuit court of appeals, three judges sitting, affirmed petitioners' convictions, they filed a petition for a rehearing. The circuit court of appeals, five judges sitting *en banc*, denied the petition and amended the opinion previously rendered. Petitioners raise the question whether they were entitled to oral argument on their petition before the circuit court of appeals sitting *en banc*.

STATEMENT

Petitioners and eight others[1] were indicted on December 18, 1940 (R. 1), in the United States District Court for the District of New Jersey on five counts. Four of the counts charged violation of Sections 2810, 2812, 2833, and 2834 of the Internal Revenue Code (26 U. S. C. 2810, 2812, 2833, 2834) relating to the possession, manufacture, and concealment of alcohol, and the failure to register a still, etc. The fifth count charged a conspiracy to commit the foregoing offenses in violation of Section 37 of the Criminal Code (18 U. S. C. 88) (R. 21–27). Three of the defendants pleaded guilty (R. 5, 8, and see R. 19), one was acquitted at a prior trial (R. 37–38), and a severance was granted as to four others (R. 11, 29). After one trial which ended in a mistrial (R. 9), petitioners were found guilty on all counts of the indictment (R. 13). With the exception of petitioner Ippolito, who received an additional year of imprisonment on the fourth count, all the petitioners received the following similar sentences: two years' imprisonment and a fine of $100 on count one; two years' imprisonment, a fine of $100, and a penalty of $500 on count two; a fine of $100 and a penalty of $1,000 on count three; one year of imprisonment and a fine of

[1] The other defendants were Joseph Bematre, William Joseph Biondi, Joseph Marcanthony, Charles Tourine, Sidney Popkin, Morris R. Gordon, Jane Doe Forconi and Felix Forconi.

$500 on count four; and two years' imprisonment and a fine of $100 on count five. The terms of imprisonment on counts one, two and five were to run concurrently, but the term of imprisonment on count four was to run consecutively, making three years in all (R. 14–16). Upon appeal the judgments of conviction were affirmed (R. 729).

The Government's case may be summarized as follows:

In January 1940, petitioners Ciccone, Di Nola, and Ippolito, as well as Bematre, Angelo Merino and Popkin attended a meeting at Ciccone's home at which they discussed plans for setting up a still at 1060 Revere Avenue, in Trenton, New Jersey, and where to procure parts for it (R. 564–565). They also decided that Ciccone and Lamantia would install the still (R. 564–565), and that they would share the profits equally (R. 568). At a subsequent meeting, $800 was given to Ciccone with which to purchase necessary equipment for the still (R. 566–567). Petitioners Ippolito and Di Nola accompanied him on several occasions while he purchased the requisite equipment (R. 567–568). In February 1940, petitioner Ciccone, after receiving money from Bematre, drove to New York and brought back some round "brass colored" pipes (R. 272). A garage at 416 Cuyler Avenue in Trenton, New Jersey, was rented and equipment, as well as sugar, stored there (R. 32, 61–63, 571).

Petitioner Maggio accompanied Marcanthony when the latter borrowed a truck with which he and one Bornhorst hauled three water tanks from a tinsmith to Bornhorst's garage, where they were stored until the next morning (R. 124–129, 332). Ciccone also used the same truck to haul other equipment to 1060 Revere Avenue where the still was situated (R. 41, 572–573), and after delivery of the still parts, Ciccone, Biondi, and Lamantia set up the still (R. 568–569).

The petitioners and other defendants commonly consorted together from the inception of the scheme until the raid several weeks later (R. 141, 162, 167, 175–176, 215–216, 236, 237, 238, 243–244, 247, 249, 259, 263, 274). In the middle of February 1940, on at least one occasion petitioners Ippolito, Di Nola, Ciccone and others met at 1060 Revere Avenue (R. 569, 570, 577), and in Bematre's room to discuss the operation of the still and plans for raising additional money to finance the scheme (R. 573). Ciccone offered Lamantia a job operating a still (R. 271), and Ciccone was heard talking to Bematre about sugar and yeast (R. 273). There was also direct testimony that petitioners Ippolito, Di Nola, and Ciccone, among others, "were interested in this still" (R. 565, 601).

Shortly after 8:00 p. m. on February 24, 1940, police officers observed twenty 100-pound bags of sugar in the garage at 416 Cuyler Avenue. Later the officers entered the garage and found also thirty-four 5-gallon cans, which bore the odor of

gasoline (R. 32–33). Bematre was then arrested as he approached the garage (R. 33–34). The police officers proceeded to 1060 Revere Avenue where they detected the odor of alcohol when they walked alongside (R. 37). They also observed a 250-gallon oil tank in the rear of these premises (R. 38). The premises were thereafter kept under surveillance by a police officer (R. 38, 40).

Between 1:00 and 6:00 a. m. on February 25, 1940, petitioners Ciccone and Di Nola were in an auto cruising about the vicinity of 1060 Revere Avenue. Several times it slowed down and almost stopped when approaching that address (R. 294, 295, 307, 309). About 4:15 a. m. Ciccone and Di Nola caught the attention of a police officer with whom they were acquainted. Upon the officer's approach, Di Nola said, "A fellow in the back here wants to see you." Thereupon Ciccone, who was in the rear of the car, inquired whether the officer knew "anybody over on Revere Avenue" and stated, "There's a grand in it to get that cop away from there for two hours." (R. 320, 321.)

At 6:00 a. m. that same morning, the car in question stopped a few doors from 1060 Revere Avenue. After a few moments it proceeded into the alley in back of Revere Avenue and stopped in the rear of 1060. A man ran from the yard and jumped into the car which was then driven away (R. 295, 307–308). About 10:00 a. m. the next morning, the police officers entered the Revere Avenue

premises and found a still with a capacity of between 500 and 1,000 gallons (R. 41, 43). In the cellar they found a steam boiler, a Gould electric pump, an oil burner attached to the steam boiler, a molasses mixing tank, approximately 75 pounds of yeast, and a bag of urea, a chemical which hastens the fermentation of mash (R. 41). On the second floor they found some distilling apparatus consisting of a cooker, two receiving tanks, a copper column and two 5-gallon cans full of alcohol (R. 42, 66–67). Neither can bore a revenue tax stamp, nor was there any sign on the premises indicating that the still was registered (R. 43). On the third floor they found the remainder of the distilling apparatus, which consisted of a dephlegmator, a cooling tank with copper coils and eight galvanized vats containing approximately 3,200 gallons of mash (R. 42, 66–67). The burner in the basement, still warm at the time of the raid (R. 44), was identified as identical to one sold to petitioner Maggio in December 1939 (R. 74–78, 86).

Shortly after the raid, several of the defendants, including Ciccone and Maggio, gathered at the home of Mrs. Bornhorst (R. 333–334, 340). On this occasion Maggio asked Biondi how they eluded the police raid at the Revere Avenue house (R. 342–345). Later, when all the men were in Mrs. Bornhorst's kitchen, Marcanthony said, "We put it over on them that time" (R. 344). A neighbor had given them a signal (R. 344).

ARGUMENT

1. Petitioner Ippolito makes the novel contention that the effect of the trial court's denial of his motion for a directed verdict at the close of the Government's case "was to compel the defendant to choose to become a witness against himself" in contravention of the Fifth Amendment (Pet. 18–19). This contention is patently frivolous, for, clearly, Ippolito's exercise of his privilege of adducing evidence and testifying in his own behalf cannot be viewed as compulsion in any degree.[2]

Moreover, it is plain that the motion was properly denied. The existence of the conspiracy having been shown, Ippolito's participation therein may properly be inferred from the frequency of his day and night-time visits to Bematre's room from the middle of January to the time of the raid (R. 215–216), his close associations with other defendants during the same period (R. 236, 238, 243–244, 247) and the fact that he was seen working around the premises on at least two occasions shortly before the raid (R. 96). "The verdict of a jury must be sustained if there is substantial evidence taking the view most favorable to the

[2] Motions for directed verdicts were also made by the other petitioners, and upon their denial (R. 12–13) each of them testified on his own behalf. Since none of them joined in Ippolito's contention, they impliedly concede that there was sufficient evidence as to their guilt to go to the jury.

Government, to support it." *Glasser* v. *United States,* Nos. 30–32, this Term, decided January 19, 1942. And where a conspiracy is established, slight evidence connecting the defendant therewith may still be substantial and, if so, sufficient to sustain a conviction. *Meyers* v. *United States,* 94 F. (2d) 433 (C. C. A. 6), certiorari denied, 304 U. S. 583; *Galatas* v. *United States,* 80 F. (2d) 15, 24 (C. C. A. 8), certiorari denied, 297 U. S. 711.[3]

In any event, petitioner concedes (Pet. 2, 26) "that Bematre's testimony implicated Ippolito in the offenses charged in the indictment," and as the court below held (R. 724) "the order in which testimony is presented at a criminal trial is solely within the discretion of the trial judge." *Goldsby* v. *United States,* 160 U. S. 70, 74; *Diehl* v. *United States,* 98 F. (2d) 545, 548 (C. C. A. 8); *United*

[3] Similarly, with respect to the counts charging substantive offenses, it is settled that if a conspiracy is shown, as in the present case, the acts and declarations of one defendant, outside the presence of his co-defendants, but in the course of the conspiracy, are admissible against the latter, even though a conspiracy is not charged in the indictment. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 249; *Lincoln* v. *Claflin,* 7 Wall. 132, 139; *United States* v. *Cohen,* 124 F. (2d) 164, 166 (C. C. A. 2), certiorari denied, *sub nom. Bernstein* v. *United States,* No. 870, this Term, March 2, 1942; *Quercia* v. *United States,* 70 F. (2d) 997, 998–999 (C. C. A. 1), reversed on other grounds, 289 U. S. 466; *Friscia* v. *United States,* 63 F. (2d) 977, 981 (C. C. A. 5), certiorari denied, 289 U. S. 762; *Zarate* v. *United States,* 41 F. (2d) 598, 599 (C. C. A. 5), certiorari denied, 282 U. S. 867.

States v. *Hirsch*, 74 F. (2d) 215, 219 (C. C. A. 2).[4] Therefore, even if the trial court's ruling were erroneous, in the light of the entire record, the error was so insubstantial as not to warrant reversal. Section 269 of the Judicial Code (28 U. S. C. 391); *Spivey* v. *United States*, 109 F. (2d) 181, 186 (C. C. A. 5), certiorari denied, 310 U. S. 631; *Borum* v. *United States*, 56 F. (2d) 301, 303–304 (App. D. C.), certiorari denied, *sub nom. Logan* v. *United States*, 285 U. S. 555; *Haywood* v. *United States*, 268 Fed. 795, 798 (C. C. A. 7), certiorari denied, 256 U. S. 689. As the court below observed (R. 724) "the trial of a criminal case is not a game in which a guilty defendant is entitled to go free merely because, at an intermediate stage of the proceedings the government through no fault of its own has not been able to offer evidence, later procured and offered, which establishes the defendants' guilt." Cf. *McGuire* v. *United States*, 273 U. S. 95, 99.

2. Petitioners' assertion that the Assistant United States Attorney deliberately elicited testimony unrelated to the charges that petitioner Di Nola and another assaulted and robbed Bematre is

[4] It was not until after the defendants had completed their testimony that Bematre, who was named in the indictment, expressed a desire to testify for the Government (R. 563, 607, 613-614). His testimony completely disclosed the activities of the defendants and supplemented, particularly, the evidence against petitioner Ippolito by showing the objects and purposes of the various meetings which the evidence showed that Ippolito had attended (R. 565, 623).

unwarranted by the record. As the court below found (R. 728), "the answers were non-responsive and unsolicited by the United States attorney." Immediately preceding Bematre's objectionable response the following colloquy occurred (R. 575):

> Mr. Tuso [Defense counsel]. May I inquire is this in connection with the charges?
>
> Mr. Stanziale [Assistant United States Attorney]. Yes, in connection with the still.

When the witness volunteered the information, the Assistant United States Attorney was the first to protest, "No, no, about the still." (R. 575; see also R. 576). The judge immediately instructed the jury to disregard the statement and not permit it to enter into their deliberations (R. 576), and again, in his final charge, told them not to predicate their verdict upon anything which had been excluded by the court (R. 674).

Moreover, on cross-examination of Bematre, petitioner Di Nola's counsel examined him with respect to the alleged robbery, apparently to show prejudice on his part (R. 610), and thereby, as the court below said (R. 728) "opened the door to reexamination of this point by government counsel."

It is clear, therefore, that any prejudice which may have resulted from the reference to the robbery was adequately cured both by the trial court's instructions to the jury (*Throckmorton* v. *Holt*, 180 U. S. 552, 567; *United States* v.

Nimerick, 118 F. (2d) 464, 466 (C. C. A. 2), certiorari denied, 313 U. S. 592; *Jackson* v. *United States,* 66 F. (2d) 280, 283 (App. D. C.), certiorari denied, 290 U. S. 626; *United States* v. *Rosenstein,* 34 F. (2d) 630, 634–635 (C. C. A. 2), certiorari denied, 280 U. S. 581) and by the deliberate reopening of the matter by petitioners' counsel.

3. Petitioners' contention (Pet. 6–7, 13, 25–27) that the trial court improperly permitted the Assistant United States Attorney to introduce prior contradictory statements [5] to neutralize the testimony of Government witness Hahn is without merit. Mrs. Hahn testified that she was unable to identify any of the petitioners as patrons of the Cypress Restaurant where she formerly worked (R. 182). Previously, however, in a statement made in May 1940, she had identified both Ippolito (R. 190) and Maggio (R. 187, 188) as patrons and at a previous trial she had identified Maggio as such a patron (R. 205). Thereupon the Assistant United States Attorney, pleading surprise, requested and obtained permission to ask the witness certain questions, based on her prior statement, in order to

[5] Petitioners' claim (Pet. 23) that during his examination of witness Hahn, the Assistant United States Attorney "brought before the jury hearsay statements that the petitioners and their associates were underworld characters" refers to the prior statement made by the witness Hahn in which she referred to one of the petitioners as a member of the "Big Four" (R. 188). But there is nothing in the record to show that the "Big Four" was a "sinister" underworld characterization.

neutralize her testimony (R. 185, 186). It is settled law that the trial court in its discretion, may, as in the present case, allow the prosecutor to examine his own witness as to prior contradictory statements if the witness' testimony takes him by surprise.[6] *Hickory* v. *United States,* 151 U. S. 303, 309; *Walker* v. *United States,* 104 F. (2d) 465, 470 (C. C. A. 4); *United States* v. *Graham,* 102 F. (2d) 436, 441–442 (C. C. A. 2), certiorari denied, 307 U. S. 643; *Curtis* v. *United States,* 67 F. (2d) 943, 946 (C. C. A. 10). *Di Carlo* v. *United States,* 6 F. (2d) 364, 367–368 (C. C. A. 2), certiorari denied, 268 U. S. 706.

4. Petitioners' contention (Pet. 7, 13–14, 27–29) that they were entitled to oral argument on their petition for rehearing before the circuit court of appeals sitting *en banc* is quickly disposed of by Rule 35 of the Rules of the Circuit Court of Appeals for the Third Circuit, set out in the Appendix to petitioners' brief (Pet. 31). This rule provides:

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[6] Petitioners' assertion that the prosecutor "obviously was not surprised" (Pet. 13, 6, 25) is unwarranted. While it is true that Mrs. Hahn testified that on the preceding day she told an "Investigator" that she was not then positive in her identification of any of the petitioners (R. 192), there is nothing in the record to show who the "Investigator" was, what his connection with the case was, or that the Assistant United States Attorney was advised of that statement (see R. 201). In any event, as the court below said (R. 726), the trial court was entitled to accept the prosecutor's claim of surprise without more. *United States* v. *Graham,* 102 F. (2d) 436, 441–442 (C. C. A. 2).

> Such a petitione is not subject to oral argument and will not be granted, unless a judge who concurred in the judgment desires it, or a majority of the court *en banc* so determines.

It is clear that this rule contemplates consideration of petitions for rehearing by the court *en banc,* even though only three judges heard the argument on appeal.[7]

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or any question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1942.

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[7] Nothing in *Commissioner* v. *Textile Mills Securities Corp.*, 117 F. (2d) 62 (C. C. A. 3), aff'd, 314 U. S. 326, or *Oughton* v. *National Labor Relations Board*, 118 F. (2d) 486 (C. C. A. 3), relied on by petitioners (Pet. 27–28), suggests the contrary. In both of those cases arguments were heard by the entire court sitting *en banc* after the petition for rehearing had been granted. Neither case, however, suggested that one who petitions for rehearing is entitled to oral argument on the petition itself.

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